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May 1, 2019

BY COURIER

Kate Sadeck, Esq.
Office of Attorney General
150 South Main Street
Providence, RI 02903

Re: Complaint Regarding Denial of Access to Public Records Concerning UHIP

Dear Ms. Sadeck:

We represent LMG Rhode Island Holdings, Inc., as owner of The Providence Journal (the "Journal"). On behalf of the Journal, we are submitting a complaint to your office pursuant to the Access of Public Records Act ("APRA") and specifically pursuant to Rhode Island General Laws § 38-2-8. For reasons set forth below, the Journal has been wrongfully denied access to various records concerning the Unified Health Infrastructure Project ("UHIP") matter, and particularly documents related to the State's apparent extension of its UHIP contract with Deloitte and any related internal communications. The requested records are in the possession of the Executive Office of Health and Human Services ("EOHHS"), but that office has refused to produce the records in response to a valid APRA request made by the Journal. For reasons set forth herein, the Journal submits that EOHHS has wrongfully refused to provide access to these public records concerning a matter of significant public interest.

On or about February 4, 2019, the Journal, acting through Kathy Gregg, a news reporter, directed an APRA request to EOHHS and sought: "[I]nformation related to the documents since July 1, 2018 that relate to the extension of the Deloitte/UHIP contract including but not limited to e-mails to and from Deloitte – and within EOHHS – in agreements, contract amendments, extensions, MOUs and the like." The original request by the Journal is attached hereto as

Exhibit A. After EOHHS availed itself of additional time under the statute, EOHHS responded by letter to Ms. Gregg dated March 18, 2019. The EOHHS response is attached hereto and incorporated herein as Exhibit B.

In its response, EOHHS agreed to produce two (2) specific documents identified therein. However, beyond that, EOHHS broadly asserted three (3) exceptions to public disclosure outlined in the APRA statute, and withheld seventy-three (73) documents itemized in an "Exemption Log." EOHHS identified the following three (3) statutory exceptions to production of public records under APRA:

- § 38-2-2(4)(K) ("Preliminary drafts, notes, impressions, memoranda, working papers, and work products");
- § 38-2-2(4)(E) ("Any records that would not be available by law or rule of court to an opposing party in litigation"); and
- § 38-2-2(4)(I)(A) ("All records relating to a client/attorney relationship").

With respect to the second exception set forth above, concerning documents that would "not be available by law or rule of court to an opposing party in litigation," EOHHS specifically asserted such protection for any "Rule 408 settlement negotiations" and documents covered by the so-called "deliberative process privilege."

Following that denial of access by EOHHS, Ms. Gregg and the Journal pursued an appeal to the Interim Secretary, as the chief officer of EOHHS, in accordance with procedures outlined in the statute. A copy of that appeal is attached hereto as Exhibit C. In response, by letter dated April 8, 2019, Interim Secretary Weis rejected the appeal and denied the Journal's request for access to additional records. A copy of that response by the Interim Secretary is attached hereto as Exhibit D. That response relied heavily on the so-called "deliberative process privilege" in support of EOHHS' position under § 38-2-2(4)(E) ("records that would not be available by law or rule of court to an opposing party in litigation"). Based on the Exemption Log, EOHHS withheld at least forty-four (44) documents on this basis.

The Journal believes and asserts that EOHHS has misused the so-called "deliberative process privilege" and has wrongfully asserted that alleged "privilege" in this instance in a deliberate effort to withhold a substantial body of documentation concerning a public agency's consideration of matters that are undeniably of significant public interest. Hence, consistent with procedures outlined in APRA, and consistent with EOHHS' letter dated April 8, 2019, the Journal is appealing to this office for reasons set forth below.

First, there is absolutely no basis in APRA itself for the invocation of any such "deliberative process privilege." Rather, the statute contemplates that public records will be, and must be, produced but for a list of specifically enumerated exceptions. See The Providence Journal Company v. Convention Center Authority, 774 A.2d 40, 46 (R.I. 2001) (citing analogous

FOIA cases for the proposition that APRA requires disclosure of public records “unless the documents fall within the enumerated exceptions). This alleged “privilege” is not identified anywhere in the statute, nor is there any indication that it would be included or subsumed within a broad statutory exception related to records that may nor may not be available in litigation. Rather, APRA makes clear that the statute is intended to “facilitate public access to government records,” Rhode Island Gen. Laws § 38-2-1, which includes the “free flow and disclosure of information to the public,” Providence Journal Co. v. Sundlun, 616 A.2d 1131, 1134 (R.I. 1992).

Moreover, even if Rhode Island courts have at times recognized a loose and amorphous concept known as “deliberative process privilege,” there is no basis for its assertion in this instance (outside the context of litigation) and it does not apply when the internal deliberations of a government agency represent the very matter at issue. Otherwise, the “deliberative process privilege” can be used as an unlimited shield to deny the public access to information regarding the internal workings of government in a way that is diametrically opposed to the stated purpose of APRA.

In a decision published in 2014, the Rhode Island Superior Court specifically considered the invocation of the “deliberative process privilege” in a matter involving another recent high-profile matter of public concern – the failure of 38 Studios and the handling of that matter by certain officials in the Rhode Island Economic Development Corporation (“EDC”). See Rhode Island Economic Development Corporation v. Wells Fargo Securities, et al, C.A. No. PB 12-5616, 2014 WL 3709683 (Super. Ct. July 7, 2014) (Silverstein, J.). In that case, one of the named defendants sought to compel the production of various documents that had been designated as “privileged” by EDC under the so-called “deliberative process privilege.” While recognizing that such a “privilege” was employed by the Rhode Island Supreme Court in one prior instance, the court also noted that “[w]here the deliberative or decision making process is the single ‘central issue’ in the case, the need for the deliberative documents will outweigh the possibility that disclosure will inhibit future candid debate among agency decision-makers.” Id. (quoting Delphi Corp. v. United States, 276 F.R.D. 81, 85 (S.D.N.Y. 2011)). Hence, the “deliberative process privilege” is not absolute and it does not provide a state agency with a shield behind which it can invariably hide its deliberations and functions in all instances. The application of this seldom-used doctrine depends on whether the public interest in any such internal communications clearly outweighs the perceived or asserted risk associated with making such discussions public. See id. In the EDC case, the court ordered production of the documents because the decision-making by that body (in concert with other state officials) was precisely what was at issue.

There can be little doubt at this point that UHIP constitutes a matter of significant public interest and public concern. Consequently, of equally significant public interest is the apparent resolution of the State’s disputes with Deloitte, the principal contractor on that ill-fated project, including any extension of the Deloitte contract. As set forth in Ms. Gregg’s appeal to EOHHS, Governor Raimondo had previously stated that she could not envision extending the Deloitte contract, but it now appears that such a contract extension will serve as a central part of the

resolution of this long-standing matter that affected the lives of thousands of Rhode Islanders. The process by which that decision was made, and the factors considered in that process, can and should be made known to the public. It is entirely inconsistent with the stated purpose and the literal terms of APRA for a public body to misuse an amorphous concept known as the “deliberative process privilege” to deny the public access to the basis for such a consequential decision affecting people throughout this state. Moreover, as Ms. Gregg noted in her appeal (Exh. C), Governor Raimondo’s office previously made a substantial body of documentation available to the public concerning internal government discussions and deliberations about UHIP, suggesting that this latest invocation of the “deliberative process privilege” is both a departure from past practice and a self-serving situational response.

A careful review of the forty-four (44) documents withheld from production under the guides of this “deliberative process privilege” reveals how far-reaching and significant those internal discussions were over a period of what appears to be approximately five (5) months. It cannot be justifiable that a public body withholds such a significant body of critical information, and then simply inform the public of an ultimate outcome without adequate disclosure of how or why it happened. For reasons set forth herein, the Journal urges the Office of Attorney General, in the spirit of open government, to review the subject documents listed in the Exemption Log and to order EOHHS to produce any and all such documents.

In addition to the foregoing, EOHHS has indicated that some documents have been withheld because they are “Rule 408 settlement negotiations.” But, there is no clear underlying premise for the invocation of that protection. There was certainly no pending litigation at the time, nor is there any indication that a threat of litigation or comparable demand was made. Merely labeling communications as settlement negotiations is not enough unless there is a credible basis for the invocation of such protection. The Journal requests the Attorney General to make a more thorough inquiry regarding EOHHS’ reliance on this basis for withholding public records from disclosure, and requests that any and all such documents be produced.

Finally, EOHHS appears to have over-used the statutory exception protecting “preliminary drafts.” That exception under APRA may warrant the withholding of a preliminary draft when the ultimate final version of that same document is produced. But the Exemption Log generated by EOHHS does not make clear that this exception was asserted on such a limited basis. Rather, it appears that numerous other documents regarding “strategy” and “contract roll-out planning” were withheld even though they do not appear to be designated as “drafts.” It also appears that EOHHS withheld something called a “Federal Partner UHIP Project in Deloitte Relationship Update.” That document does not appear to be a draft, nor does there appear to be any independent basis for otherwise withholding it. The Journal urges the Office of Attorney General to revisit this specific aspect of EOHHS’ refusal to produce relevant public records as well.

For the foregoing reasons, we respectfully request that your office institute a proceeding challenging the refusal by EOHHS to respond fully and appropriately to the Journal’s request

Michael Field, Esq.

May 1, 2019

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pursuant to APRA. We appreciate your office's consideration of this issue, and we welcome the opportunity to address any questions that you may have.

Respectfully Submitted,


Mark W. Freel

Enclosures

cc: Michael Field, Esq. (by e-mail; w/ encls.)
Edwin M. Larkin, Esq.
Ms. Kathy Gregg

EXHIBIT A

Freel, Mark

From: Freel, Mark
Sent: Tuesday, April 30, 2019 11:01 AM
To: Freel, Mark
Subject: FW: [EXTERNAL] : Re: OHHS follow ups

----- Forwarded message -----

From: Gregg, Kathy <kgrcgg@providcnccjournal.com>
Date: Mon, Feb 4, 2019 at 1:00 PM
Subject: Re: [EXTERNAL] : Re: OHHS follow ups
To: Connelly, Meghan (DEA) <Meghan.Connelly@dca.ri.gov>, Kathy Gregg <kgrcgg@providcnccjournal.com>

Josh in governor's office suggested I direct this to you:

What is the timeline for DISCLOSURE of what the Raimondo administration intends to do when the Deloitte UHIP contract expires next month.

If the contract is to be extended, under what terms, at what cost, for what period of time?

Pursuant to the state's Access to Public Records Act, please provide access to all documents since July 1, 2018 that relate to the extension of the Deloitte/ UHIP contract, including but not limited to emails to and from Deloitte - and within EOHHS - and agreements, contract amendments, extensions, MOUs and the like.

EXHIBIT B



Rhode Island Executive Office of Health and Human Services
Legal Office, Three West Road, Virks Building, 4th Floor, Cranston, RI 02920
phone: 401.462.2326 fax: 401.462.1678

March 18, 2019

VIA EMAIL: kgregg@providencejournal.com

Kathy Gregg
Providence Journal

Re: Request for Public Records

Dear Ms. Gregg:

The Executive Office of Health and Human Services ("EOHHS") received your request on February 4, 2019 and subsequently invoked its right under Rhode Island General Laws Section 38-2-3(e) to respond to your request within thirty (30) business days of receipt. Your request seeks:

"information related to the documents since July 1, 2018 that relate to the extension of the Deloitte/UHIP contract, including but not limited to emails to and from Deloitte – and within EOHHS – and agreements, contract amendments, extensions, MOUs and the like."

Your request is exclusively governed by the Rhode Island Access to Public Records Act ("APRA") contained in R.I. Gen. Laws § 38-2-1 *et seq.* This response is solely on behalf of EOHHS.

The following public documents are responsive to your request:

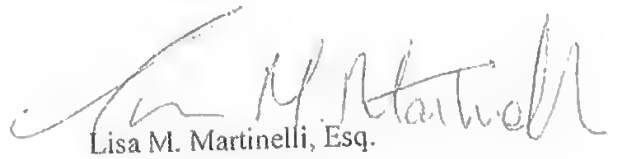
1. September 14, 2018 Letter from Mark Price to former Secretary Eric J. Beane
2. December 31, 2018 Letter from Director Hawkins to Kurt Messner, FNS

There were a significant number of documents responsive to your request which are not public and fall under the following exemptions:

- (1) R.I. Gen. Laws § 38-2-2 (4)(K) ("Preliminary drafts, notes, impressions, memoranda, working papers, and work products");
- (2) R.I. Gen. Laws § 38-2-2 (4)(E) ("Any records that would not be available by law or rule of court to an opposing party in litigation", including documents falling under Rule 408 settlement negotiations and the the deliberative process privilege;
- (3) R.I. Gen. Laws § 38-2-2 (4)(I)(a) ("All records relating to a client/attorney relationship").

If you would like to appeal any portion of this response you may do so in accordance with the requirements of R.I. Gen. Laws § 38-2-8 to Acting Secretary Lisa Vura-Weis who, for the purpose of such appeals, is the Chief Administrative Office of EOHHS. The appeal should be sent to the attention of Acting Secretary Lisa Vura-Weis, EOHHS, Three West Road, 4th Floor, Cranston, RI 02920. Alternatively, if you wish, you can directly appeal this decision to the Rhode Island Office of the Attorney General, 150 South Main Street, Providence, RI 02903. Should you have any questions or concerns about this matter, please contact the Executive Office of Health and Human Services Division of Legal Services at (401) 462-5274.

Sincerely,



Lisa M. Martinelli, Esq.

Attachments

EXEMPTION LOG March 18, 2019

The following documents are deemed non-public with no portion of the document containing reasonable segregable information that is releasable in accordance with R.I. Gen. Laws § 38-2-3(b).

(1) The following documents are exempt pursuant to R.I. Gen. Laws §38-2-2 (4)(K) ("Preliminary drafts, notes, impressions, memoranda, working papers, and work products"):

- a. Multiple drafts of Contract Amendment 47 and Attachments A-H
- b. January 2019 Draft Correspondence from Acting Secretary Vura Weis to Mark Price
- c. UHIP Contract Roll-Out Planning 1/22/2019
- d. Public Affairs Strategy: HHS FY 2020 Budget (1/8/2019)
- e. Public Affairs Strategy: HHS FY 2020 Budget (2/5/2019)
- f. 2019 Draft Letter to Ryan Fitzgerald from Acting Secretary Vura Weis
- g. November 14, 2018 Vendor Settlement Planning DoIT Recommendations
- h. February 10, 2019 "Federal Partner UHIP Project and Deloitte Relationship Update"

(2) The following documents are exempt pursuant to R.I. Gen. Laws §38-2-2 (4)(E) ("Any records that would not be available by law or rule of court to an opposing party in litigation;" the Rhode Island Supreme Court recognizes the "deliberative process privilege" to exempt the internal deliberations of an agency in order to safeguard the quality of agency decisions):

- a. September 30, 2018 e-mail from Chris Colen to Ken Brindamour, Benjamin Shaffer, Matt Stark, Chirag Patel re: Action Assignments, Technical Initiatives
- b. October 1, 2018 e-mail from Ken Brindamour to Chris Colen, Benjamin Shaffer, Matt Stark, Chirag Patel re: Action Assignments, Technical Initiatives
- c. October 3, 2018 e-mail from Ken Brindamour to Secretary Beane, Lisa Martinelli, Benjamin Shaffer, Matt Stark re: Next Negotiation, Draft Working Document
- d. October 22, 2018 e-mail from Benjamin Shaffer to Matt Stark re: Possible Perspective on Deloitte Response
- e. November 14, 2018 e-mail from Bijay Kumar to Director Hawkins, Benjamin Shaffer, Chirag Patel, Secretary Beane re: DoIT Recommendations
- f. November 26, 2018 e-mail from Director Hawkins to Ken Brindamour, Chirag Patel, and Chris Colen re: Input regarding C.A. 47
- g. December 5, 2018 Settlement Briefing

- h. December 27, 2018 e-mail from Director Hawkins to Directors Sherman and Tighe, Benjamin Shaffer, Bijay Kumar, Chirag Patel, Chris Colen, Jim Ritter, and Matt Stark re: Team Review C.A. 47
- i. December 28, 2018 e-mail from Director Sherman to Directors Hawkins and Tighe, Benjamin Shaffer, Bijay Kumar, Chirag Patel, Chris Colen, Jim Ritter, and Matt Stark re: Team Review C.A. 47
- j. January 8, 2019 e-mail from Benjamin Shaffer to Matt Stark re: C.A. 46 Extension to June 30, 2019
- k. January 9, 2019 e-mail from Matt Stark to Benjamin Shaffer re: C.A. 46 Extension to June 30, 2019
- l. January 9, 2019 e-mail from Benjamin Shaffer to Acting Secretary VuraWeis
- m. January 9, 2019 e-mail from Matt Stark to Directors Sherman, Hawkins, and Tighe, Benjamin Shaffer, Bijay Kumar, Chirag Patel, Chris Colen, Jim Ritter re: Team Review C.A. 47
- n. January 9, 2019 e-mail from Director Hawkins to Directors Sherman and Tighe, Benjamin Shaffer, Bijay Kumar, Chirag Patel, Chris Colen, Jim Ritter, and Matt Stark re: Team Review C.A. 47
- o. January 10, 2019 e-mail from Brenna McCabe to Acting Secretary Lisa Vura Weis, Director DiBiase Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- p. January 10, 2019 e-mail from Michael Raia to Brenna McCabe, Acting Secretary Lisa Vura Weis, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- q. January 10, 2019 e-mail from Ashley O'Shea to Michael Raia, Brenna McCabe, Acting Secretary Lisa Vura Weis, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- r. January 10, 2019 e-mail from Director Hawkins to Ashley O'Shea, Michael Raia, Brenna McCabe, Acting Secretary Lisa Vura Weis, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- s. January 10, 2019 e-mail from Acting Secretary Vura Weis to Director Hawkins, Ashley O'Shea, Michael Raia, Brenna McCabe, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- t. January 10, 2019 e-mail from Acting Secretary Vura Weis to Director Hawkins, Ashley O'Shea, Michael Raia, Brenna McCabe, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman, and Director Tighe re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices

- u. January 10, 2019 e-mail from Josh Block to Acting Secretary Vura Weis, Director Hawkins, Ashley O'Shea, Michael Raia, Brenna McCabe, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman, and Director Tighe re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- v. January 10, 2019 e-mail from Brenna McCabe to Josh Block, Acting Secretary Vura Weis, Director Hawkins, Ashley O'Shea, Michael Raia, Brenna McCabe, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman, and Director Tighe re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- w. January 10, 2019 e-mail from Meghan Connelly to Brenna McCabe, Josh Block, Acting Secretary Vura Weis, Director Hawkins, Ashley O'Shea, Michael Raia, Brenna McCabe, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman, and Director Tighe re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- x. January 10, 2019 e-mail from Benjamin Shaffer to Meghan Connelly, Brenna McCabe, Josh Block, Acting Secretary Vura Weis, Director Hawkins, Ashley O'Shea, Michael Raia, Brenna McCabe, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman, and Director Tighe re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- y. January 10, 2019 e-mail from Brenna McCabe to Benjamin Shaffer, Meghan Connelly, Brenna McCabe, Josh Block, Acting Secretary Vura Weis, Director Hawkins, Ashley O'Shea, Michael Raia, Brenna McCabe, Director DiBiase, Jonathan Womer, Thomas Mullaney, Dacia Read, Benjamin Shaffer, Emily Eelman, and Director Tighe re: ACLU Settles UHIP Related Lawsuit over Medicaid Termination Notices
- z. January 11, 2019 e-mail from Ashley O'Shea to Matt Stark, Brenna McCabe, Brenda Whalen Munro, and Katie Alijewicz re: Budget Trickies
- aa. January 11, 2019 e-mail from Katie Alijewicz to Brenna McCabe, Maureen Wu re: Budget Trickies
- bb. January 13, 2019 e-mail from Benjamin Shaffer to Ashley O'Shea Matt Stark, Brenna McCabe, Brenda Whalen Munro, and Katie Alijewicz re: Budget Trickies
- cc. January 14, 2019 e-mail from Ashley O'Shea to Emily Eelman, Benjamin Shaffer, Matt Stark, Brenna McCabe, Brenda Whalen Munro, and Katie Alijewicz re: Budget Trickies
- dd. January 14, 2019 e-mail from Brenna McCabe to Ashley O'Shea, Emily Eelman, Benjamin Shaffer, Matt Stark, Brenna McCabe, Brenda Whalen Munro, and Katie Alijewicz re: Budget Trickies
- ee. January 14, 2019 e-mail from Emily Eelman to Brenna McCabe, Benjamin Shaffer, Matt Stark, Brenda Whalen Munro, Katie Alijewicz, Maureen Wu, and Courtney Hawkins re: Budget Trickies
- ff. January 15, 2019 e-mail from Ashley O'Shea to Rose Jones re: UHIP Trickies

- gg. January 15, 2019 e-mail from Matt Stark to Ashley O'Shea re: Latest UHIP Q & A
 - hh. January 15, 2019 e-mail from Ashley O'Shea to Matt Stark re: Latest UHIP Q & A
 - ii. January 18, 2019 e-mail from Rose Jones to Ashley O'Shea re: UHIP Trickies
 - jj. January 17, 2019 e-mail from Director Hawkins to Matt Stark re: CA 46 Extension
 - kk. January 17, 2019 e-mail from Ken Brindamour to Director Hawkins re: CA 46 Extension
 - ll. January 21, 2019 e-mail from Benjamin Shaffer to Chris Colen, Lori Rota, Jim Ritter, Director Hawkins, Director Tighe, Director Sherman, Rose Jones, Lisa Martinelli, Matt Stark, and Chirag Patel
 - mm. February 4, 2019 e-mail from Meghan Connelly to Ashley O'Shea and Rose Jones re: OHHS follow-ups
 - nn. February 4, 2019 e-mail from Brenna McCabe to Meghan Connelly, Ashley O'Shea and Rose Jones re: OHHS follow-ups
 - oo. February 4, 2019 e-mail from Meghan Connelly to Brenna McCabe, Ashley O'Shea and Rose Jones re: OHHS follow-ups
 - pp. February 4, 2019 e-mail from Brenna McCabe to Meghan Connelly, Ashley O'Shea and Rose Jones re: OHHS follow-ups
 - qq. February 4, 2019 e-mail from Jennifer Bogdan to Brenna McCabe, Meghan Connelly, Ashley O'Shea and Rose Jones re: OHHS follow-ups
 - rr. February 12, 2019 e-mail from Brenna McCabe to Matt Stark, Alisha Pina re: Deloitte question
- (3) The following documents are exempt pursuant to R.I. Gen. Laws §38-2-2 (4)(I)(a) ("All records relating to a client/attorney relationship"):
- a. September 29, 2018, e-mail from Attorney Christian Jenner to Benjamin Shaffer
 - b. October 1, 2018, E-mail from Ken Brindamour to Secretary Beane, Attorney Robert Duffy, Attorney Christian Jenner, and Attorney Lisa Martinelli
 - c. November 11, 2018 e-mail from Attorney Lisa Martinelli to Attorneys Robert Duffy and Christian Jenner
 - d. November 19, 2018 from Attorney Robert Duffy to Director Hawkins
 - e. November 15, 2018 e-mail from Director Hawkins to Attorney Lisa Martinelli
 - f. November 19, 2018 e-mail from Attorney Lisa Martinelli to Director Hawkins
 - g. November 21, 2018 e-mail from Director Hawkins to Attorney Lisa Martinelli;
 - h. November 26, 2018 e-mail from Attorney Robert Duffy to Attorney Lisa Martinelli;
 - i. November 26, 2018 e-mail from Attorney Lisa Martinelli to Director Hawkins

- j. November 27, 2018 e-mail from Director Hawkins to Attorney Lisa Martinelli
- k. November 27, 2018 e-mail from Attorney Lisa Martinelli to Attorneys Robert Duffy and Christian Jenner
- l. November 28, 2018 e-mail from Ken Brindamour to Attorney Robert Duffy, Attorney Lisa Martinelli and Director Hawkins
- m. November 28, 2019 e-mail from Attorney Robert Duffy to Attorney Lisa Martinelli
- n. November 29, 2018 e-mail from Attorney Christian Jenner to Director Hawkins and Attorney Lisa Martinelli
- o. November 29, 2018 Memorandum from Attorneys Robert Duffy and Christian Jenner to Director Hawkins, Attorney Lisa Martinelli, and Ken Brindamour
- p. December 3, 2018 e-mail from Attorney Lisa Martinelli to Attorneys Robert Duffy and Christian Jenner
- q. December 10, 2018 e-mail from Director Hawkins to Attorney Robert Duffy and Attorney Lisa Martinelli
- r. December 21, 2018 e-mail from Attorney Claire Richards to Director Hawkins and Attorney Lisa Martinelli
- s. December 21 2018 e-mail from Attorney Lisa Martinelli to Director Hawkins and Attorney Claire Richards Re: Confidential Settlement
- t. January 9, 2019 e-mail from Ken Brindamour to Attorney Lisa Martinelli
- u. January 10, 2019 e-mail from Matt Stark to Attorney Lisa Martinelli

EXHIBIT C

From: Gregg, Kathy <kgregg@providencejournal.com>
Sent: Monday, March 25, 2019 1:18 PM
To: Levesque, David (OHHS) <David.Levesque@ohhs.ri.gov>
Cc: Kathy Gregg <kgregg@providencejournal.com>
Subject: [EXTERNAL] : Appeal: Latest denial of access to UHIP records

To: Acting Secretary Lisa Vura-Weis, EOHHS
CC: David Levesque
From Katherine Gregg, Providence Journal
Re: APRA Appeal
March 25, 2019

This is an appeal of the broad sweep denial of all but two pieces of correspondence that led up to the decision to extend the state's contract with Deloitte for the problematic UHIP computer system.

The February 4, 2019 request denied on March 18, 2019:

Pursuant to the state's Access to Public Records Act, please provide access to all documents since July 1, 2018 that relate to the extension of the Deloitte UHIP contract, including but not limited to emails to and from Deloitte - and within EOHHS - and agreements, contract amendments, extensions, MOUs and the like.

1. The Law (Part I)

As you are aware: Rhode Island's Access to Public Records Act is aimed at making available documents that enable members of the public to understand how their government in RI works, how the public fisc is being managed and how/why significant government decisions are reached.

Specifically, the law requires the disclosure of documents "likely to contribute significantly to public understanding of the operations or activities of the government."

The denied records clearly fit this description.

2. The Precedent:

In January 2017, the Raimondo administration released at no charge more than a half dozen disks containing hundreds of emails, test results, analyses and discussion of both the test findings and next steps

In theory, any one of these documents could have been withheld as a "preliminary" working document. In releasing them, the Raimondo administration acknowledged the overriding public interest in understanding the calamitous decision to "go-live" with UHIP in September 2016 against advice, before it was ready for prime-time.

That resulted in this news story headlined: "Emails show warnings, optimism before UHIP computer launch"
<https://www.providencejournal.com/news/20170113/emails-show--warnings-optimism-before-uhip-computer-launch>
[providencejournal.com]

Summary: "Newly released emails show: Cassandras across state government warned of looming disaster weeks before the launch of the state's new \$364 million public-benefits computer system. They show a sense of increasing panic in some quarters of state government as the Sept. 13 "Go Live" day approached. "

The release of those documents after months of wrangling with EOHHS was critical to the public's understanding of what worked, what broke down, what decisions were made and who was responsible.

We now have a comparable situation:

A turnabout by a governor who a year ago said she could not envision extending the Deloitte contract. What happened in the interim? Access to documents that answer that question are again vital "to public understanding of the operations or activities of the government."

3. The Withheld documents: issues

A.. The exemption log refers to drafts of two letters: were the letters eventually sent? The exemption log does not say. If they were, they are no longer "preliminary". And if so, are there other documents being withheld from me that are not listed in the exemption log? Why not and what are they? Please provide.

B.. Others on that list don't seem "preliminary" in any way either, including DOIT recommendations/public affairs strategy/ a "Federal Partner UHIP Project and Deloitte Relationship Update." Please provide.

C. On the second set, there is certainly nothing in the headings of those emails that would indicate they would be unavailable to an opposing party in litigation.

Example: "Action assignments/technical initiatives."

Example: "DOIT recommendations"

Example: "UHIP Trickies. "

D. Dozen or so of them emanate from an ACLU news release about the settlement of a UHIP lawsuits; I can't think of any reasons why emails like that would not be discover-able. I find no Rhode Island Supreme Court cases on the "deliberative process privilege" supporting these exemptions.

E. As for the third set of withheld documents: The mere fact that the correspondence is with an attorney doesn't lead to an automatic exemption. The attorney in this case is a state employee. The client is the R.I. public. There was no pending litigation.

5. The Law (Part II)

The Raimondo administration response does not take into account APRA's requirement that "any reasonably segregable portion of a public record excluded by subdivision 38-2-2(4) shall be available for public inspection after the deletion of the information which is the basis of the exclusion.

"If an entire document or record is deemed non-public, the public body shall state in writing that no portion of the document or record contains reasonable segregable information that is releasable."

It is hard to believe that none of these documents have anything releasable.

Please reconsider the blanket withholding of all but two documents leading up to Governor Raimondo's turnaround on the extension of the Deloitte UHIP contract.

Thank you for your consideration.

Kathy Gregg
Providence Journal
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EXHIBIT D



Rhode Island Executive Office of Health and Human Services
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phone: 401.462.2326 fax: 401.462.1678

April 8, 2019

VIA EMAIL: kgregg@providencejournal.com

Kathy Gregg
Providence Journal

Re: Response to Appeal under R.I. Gen. Laws § 38-2-8 (a)

Dear Ms. Gregg:

In accordance with R.I. Gen. Laws § 38-2-8 (a)¹, please consider this correspondence responsive to your Access to Public Records Act (APRA) appeal submitted through Mr. David Levesque on March 25, 2019 (attached at Exhibit 1). You are appealing an APRA request to the Executive Office of Health and Human Services (EOHHS), which was partially denied on March 18, 2019 (attached at Exhibit 2). Upon your request, EOHHS provided you with an "Exemption Log"² (the Log) on March 19, 2019 that listed the withheld documents under each APRA exemption (attached at Exhibit 3). The issues raised in your appeal will be addressed below.

1. Original Request

Your APRA submitted to EOHHS on February 4, 2019 sought:

"information related to the documents since July 1, 2018 that relate to the extension of the Deloitte/UHIP contract, including but not limited to emails to and from Deloitte – and within EOHHS – and agreements, contract amendments, extensions, MOUs and the like."

By way of context, the controlling document to accomplish an extension of the Deloitte/UHIP contract is a duly executed contract amendment approved by the Centers for Medicare and Medicaid Services (CMS) and the Food and Nutrition Services (FNS). At present, Contract Amendment 47 (C.A. 47) is pending review with our federal partners and is still considered draft prior to execution by the state parties and Deloitte. Notwithstanding EOHHS' position, the Rhode Island Department of Administration (DOA) provided you with the Draft C.A. 47, the Transmittal Letter to CMS and FNS, and a brief overview of C.A. 47 on the same date that EOHHS responded

¹ "Any person or entity denied the right to inspect a record of a public body may petition the chief administrative officer of that public body for a review of the determinations made by his or her subordinate. The chief administrative officer shall make a final determination whether or not to allow public inspection within ten (10) business days after the submission of the review petition."

² An advisory opinion of the Rhode Island Office of Attorney General (2016 R.I. AG Lexis 6, *4) specifically states that APRA does not require a state agency to provide an index of documents or portions of documents that were withheld in a level of detail to determine whether the documents were appropriately withheld.

to your APRA. Thus, EOHHS will deem the draft C.A. 47 to be turned over since it was subsequently provided to you by a sister agency.

2. Non-Public Documents

Your appeal questions several exemptions that will be addressed in turn below.

As an initial matter, please note that you received the final version of the two draft letters contained in the Log (January 2019 Draft Correspondence from Acting Secretary Vura Weis to Mark Price; 2019 Draft Letter to Ryan Fitzgerald from Acting Secretary Vura Weis) on April 4, 2019 in response to your second APRA request with EOHHS filed on March 25, 2019. The Deloitte Extension letter that memorialized the position of the parties was not finalized and sent until March 29, 2019, succeeding your original request.

The documents listed under section (1) of the Log (R.I. Gen. Laws § 38-2-2(4)(i)(K) “Preliminary drafts, notes, impressions, memoranda, working papers and work products”) are non-public since they have not been finalized and contain multiple edits or embrace the deliberative process of EOHHS. For instance, the documents referencing “planning” or “strategy” are incapable of memorializing a final action as they contemplate a series of potential scenarios for planning and preparation purposes during the Deloitte extension and settlement process.

Likewise, the documents listed in section (2) of the Log (R.I. Gen. Laws § 38-2-2 (4)(E) “records that would not be available by law or rule of court”) are exempt under the deliberative process privilege. The Rhode Island Supreme Court has recognized the existence of this privilege which “protects the internal deliberations of an agency in order to safeguard the quality of agency decisions.”³ Under current circumstances, where EOHHS was a party to high stakes settlement negotiations, this privilege “protect[s] against premature disclosure [...] before they have been finally formulated or adopted” and prevents “confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.”⁴ Courts applying this privilege have looked to whether a document was “pre-decisional” or “prepared in order to assist an agency decisionmaker in arriving at his decision.”⁵ The privilege must be deliberative such that it makes recommendations or expresses opinions on legal or policy matters.⁶

The section (2) documents reveal all internal facets of the decision-making and finalization process in extending the Deloitte contract – from budget, IT, communications, legal effect on related litigation and a host of other factors. This type of cross subject area deliberation is exactly what would be contemplated in an unprecedented settlement such as this.

³ See *In re Commission on Judicial Tenure & Discipline*, 670 A.2d 1232, 1235 (R.I. 1996).

⁴ *Heritage Healthcare Services, Inc. v. The Beacon Mutual Insurance Co.*, 2007 WL 1234481 (R.I. Super. 2007)(Silverstein, J.) (quoting *Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999)).

⁵ *Id.* (citing *Nadler v. U.S. Dep’t of Justice*, 955 F.2d 1479, 1491 (11th Cir. 1992) (internal quotations omitted).

⁶ *Id.* at *1.

The documents withheld under section (3) (R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) “all records relating to a client/attorney relationship”) are exempt from disclosure under the attorney-client privilege. The general rule is that “communications made by a client to his attorney for the purposes of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure.”⁷

You contend that “the mere fact that the correspondence is with an attorney doesn’t lead to an automatic exemption [;] the attorney in this case is a state employee [and] the client is the R.I. public [;] and there was no pending litigation.”

First, the exempt documents contained in the Log fall under the attorney-client privilege as they constitute communications made by a client (agency directors, state managers or employees) to his or her in-house or outside legal counsel for the purposes of seeking professional advice, as well as the response[s] by the attorney to such inquiries.⁸

Second, agency in-house counsel are members of the bar and their clients (agency directors, managers, or employees) retain the assurance through this privilege that whatever legal advice is sought or provided from their counsel will remain confidential not subject to disclosure.⁹

Finally, unlike Rhode Island’s Open Meetings Act (OMA) that requires “threatened or imminent litigation reasonably anticipated by the public body” to exempt discussions in the open meeting forum,¹⁰ there is no requirement under APRA that litigation must be pending prior to the invocation of the client/attorney exemption.

⁷ 2016 R.I. AG LEXIS 62, *10-12 (quoting State v. Von Bulow, 475 A.2d 995, 1004 (R.I. 1984); See also Hickman v. Taylor, 329 U.S. 510-11 (1947) (“In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble [*11] information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”

⁸ Callahan v. Nystedt, 641 A.2d 58, 61, 1994 R.I. LEXIS 137, *6-7.

⁹ Id.

¹⁰ R.I. Gen. Laws § 42-46-5(a)(2); see also Phoenix-Times Publ’g Co. v. Barrington Sch. Comm., 2010 R.I. Super. LEXIS 170, *36, 38 Media L. Rep. 2607 (Court declined to infer a general attorney-client privilege exception to convene executive session under OMA except in instances where there is pending, threatened, or imminent litigation.

For the foregoing reasons and in view of the extensive deliberations that led to the finalization of an unparalleled settlement amendment with Deloitte, your request for further inspection of the records is denied.

If you would like to further appeal this response you may do so in accordance with the requirements of R.I. Gen. Laws § 38-2-8(b) to the Rhode Island Office of the Attorney General, 150 South Main Street, Providence, RI 02903 or to the Rhode Island Superior Court.

Sincerely,



Lisa Vura Weis
Interim Secretary

Attachments